Supreme Court, U.S.
FILED
JUN 19 1995
CLERK

No. 94-1523

In The

Supreme Court of the United States

October Term, 1994

STATE OF ALASKA,

Petitioner,

vs.

BRUCE E. BABBITT, Secretary of the Interior, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. *Block* did not interpret the Quiet Title Act to have vitiated the *ultra vires* exception.

The federal government argues (Opp. 10-14) that, under *Block v. North Dakota*, 461 U.S. 273 (1983), there is no *ultra vires* exception to the doctrine of sovereign immunity in the context of a quiet title action. By relying on *Block*, the federal government tries to avoid supporting the Ninth Circuit's basis for its decision (Pet. App. 1a) in this case, *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068 (9th Cir. 1994). *Albert* plainly did not decide the *ultra vires* issue raised here by Alaska. This issue is whether the

Secretary's disregard of the Allotment Act by allowing an allotment on **appropriated** and **mineral** land confers subject matter jurisdiction on the court under the *ultra vires* exception to sovereign immunity. The federal government would have this Court uphold the judgment of the Ninth Circuit on a different ground: that the QTA abrogated the *ultra vires* exception for trust or restricted Indian land, and that *Block* confirmed this abrogation. The federal government's argument is without merit.

The Ninth Circuit in *Albert* explicitly recognized that: (1) the "QTA is the 'exclusive means by which adverse claimants [can] challenge the United States' title to real property"; and[1] (2) the *ultra vires* exception is still good law and would have operated to permit review of the IBLA decision in that case if there had been "evidence that agency officials exceeded their authority. . . . " *Id.* at 1073, 1076, n.7. Not only did *Albert* recognize the continuing vitality of the *ultra vires* exception, but all jurisdictions which have considered the question have confirmed that the *ultra vires* exception is alive and well after *Block*.

To reach its conclusion the federal government assumes (Opp. 13, 14) that the *ultra vires* exception is synonymous with the "officer's suit" proscribed by *Block*.

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[1] The federal government also notes (Opp. 14 n.10) that Alaska violated the 180 day notice provision of 28 U.S.C. § 2409a(m). However, this section only applies to the party initiating the quiet title action. Alaska did not initiate the action. Rather, Alaska sought judicial review of a final decision rendered in an agency proceeding initiated by the Bureau of Land Management. Under 43 U.S.C. § 1632(a) Alaska was entitled to have this decision judicially reviewed. Section 2409a(m) does not apply.

However, there is a significant distinction between a so called "officer's suit" and a suit alleging *ultra vires* conduct against a federal official. An "officer's suit" is an artifice to avoid the governmental immunity of the United States in cases where the Untied States is the real party in interest based on the conduct of an official acting on its behalf. *Block*, 461 U.S. at 281. By contrast, an action alleging *ultra vires* conduct is not an artifice to avoid the governmental immunity of the United States. Rather, an action based on *ultra vires* conduct turns on whether the conduct was outside of the scope of the officer's authority or in violation of statute or the constitution. Such conduct is not considered to be the conduct of the sovereign and the sovereign cannot be bound by it. *American Policyholders Insurance Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1265 (1st Cir. 1993) (where agency action is *ultra vires*, the governmental immunity of the United States is not implicated because " 'the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign.' ")

Block did not vitiate the *ultra vires* or "*Larson* exception." *Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983) (The *Larson* exception to the sovereign immunity bar "remain[s] good law.") The Eleventh Circuit applied the *ultra vires* exception in a post-*Block* decision involving disputed title to Indian land. *Florida v. United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The court noted no impediment to the application of the *ultra vires* exception in the context of an Indian title dispute so long as a substantive allegation of *ultra vires* conduct is made against the Secretary. *Id.* at 1251-52. *See also Donnelly v. United States*, 850 F.2d 1313,

1318 (9th Cir. 1988), *cert. denied sub nom, Donnelly v. Eklutna, Inc.*, 488 U.S. 1046 (1989). *Donnelly* construed 28 U.S.C. § 2409a(e) and held the Secretary's unjustified failure to obey the Federal Power Act provided a jurisdictional basis under the APA for adjudicating a title dispute. In *Donnelly* the court pointedly rejected "the absurd result that the government could deprive someone of property title by administrative wrongdoing and then immunize its actions . . . ". *Id.* at 1318 n.5.

The federal government also relies (Opp. 15 n.11) on a recent Ninth Circuit opinion for its argument that the QTA vitiated the *ultra vires* exception. *Fadem v. United States,* No. 92-56404 (9th Cir. Apr. 3, 1995) slip op. 3573, 3581. *Fadem* does nothing to alter the applicability of the *ultra vires* exception to actions involving title to real property. *Fadem* concerned the limitations period of the QTA. It confirmed that the supreme court had later overruled *Block* insofar as *Block* held the limitations period of the QTA to be jurisdictional. Slip op. at 3581. *Fadem* held that the QTA did not affect the manner in which procedural bars to suit are applied. Slip op. at 3582. *Fadem* also noted legislative history stating that Congress did not intend enactment of the QTA to " 'alter the substantive rules of law prevailing in actions against the government.' " Slip op. at 3582 *quoting* S. Rep. No. 92-575 (Dec. 10, 1971).

The lesson of *Fadem* is that the QTA does not alter the manner in which the doctrine of sovereign immunity is applied. If the doctrine of sovereign immunity constitutes a procedural bar to suit, the QTA did not change how the doctrine is applied. If the doctrine of sovereign immunity is substantive law, the legislative history established that

the QTA did not alter it. Therefore, if the *ultra vires* exception to the doctrine of sovereign immunity is available in other suits against government officials, it is available in the QTA context as well. *Fadem* does not support that the Indian land exception of the QTA provides immunity for the *ultra vires* actions of federal officials.

Nothing in the QTA or *Block* suggests that Congress intended that the QTA remove from judicial scrutiny actions by government officials which are directly contrary to the will of Congress. The federal goverment's interpretation is novel. Every court that has considered the *ultra vires* exception to sovereign immunity in the context of the OTA has reaffirmed the vitality of the *ultra vires* exception.

II. Alaska's grant is mineral in character.

The federal government argues that Alaska's grant issued by the BLM under 23 U.S.C. § 317 is not mineral in character, and Alaska failed to make this assertion "earlier." (Opp. 17, 18) Both contentions are refuted by the record.

The mineral character of the land is established by the 1966 grant to Alaska which specifies that the use shall be as a material source. Pet. App. 32a. It is also established by the 1978 BLM decision which confirmed Alaska's compliance with the requirements of the grant. Pet. App. 38a. If there were still a question about the mineral character of the grant, then BLM was required to render a reasoned and factual decision on the issue. *Eddleman Community Property Trust,* 106 IBLA 376 (1989).

Alaska has always asserted the mineral character of the land in its grant in both administrative proceedings and judicial proceedings. Not only does the grant and the 1978 BLM decision establish the mineral character of the land, but the Affidavit of Shari Howard filed with the IBLA also confirms the mineral character.[2] Pet. App. 40a. The mineral character of the land was also specifically raised by Alaska in the Ninth Circuit in the context of the change in law occasioned by *State of Alaska, DOT&PF*, 131 IBLA 121, 126-28 (October 25, 1994). Pet. App. 42a.

No administrative or judicial finding has ever overruled the language of Alaska's grant and the undisputed evidence of mineral character in the record.[3] Due to the mineral character of the land, it was not available for an allotment under the terms of the Allotment Act, and the Secretary acted *ultra vires* in approving it for an allotment.

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[2] This affidavit demonstrates continuous use of the material site by Alaska since 1966. This use began well *before* the date Williams filed her proof of use and occupancy in 1972. Pet. App. 35a. Thus, even under the federal government's argument (Opp. 18) William's use and occupancy would not preempt the mineral character of the land.

[3] As discussed below, the BLM in a 1985 decision did determine that Parcel B was "without value for minerals." Pet. App. 23a. Alaska's material site grant was not at issue in this decision, and thus the decision did not affect Alaska's grant. *See* Argument III, *infra*.

III. Administrative finality of the 1985 BLM decision cannot form the basis of a colorable claim of Indian title where Alaska was never afforded an opportunity to challenge the assertion that Parcel B was "without value for minerals".

The federal government argues (Opp. 18) that a 1985 BLM decision stating that Parcel B was "without value for minerals" is conclusive on this issue because Alaska did not appeal the decision. However, administrative finality does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity to litigate the claim." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 and n.22 (1982).

Alaska's decision not to appeal the 1985 BLM decision must be viewed in the light of the law as it existed in 1985. In 1985 the law required that Native allotments be issued subject to rights-of-way issued by BLM prior to the filing of the allotment application. *GVEA*, 85 IBLA 363 (1985), Pet. App. 43a; *GVEA (On Reconsideration)*, 98 IBLA 203, 207 n.1 (1987), Pet. App. 49a. Further, 43 U.S.C. § 1634(a)(1) required legislatively approved allotments, such as Williams' allotment, to be issued "subject to valid existing rights." In 1985 Alaska had no reason to doubt that its grant was a valid existing right.[4] Therefore, had

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[4] It is significant that the federal government fails to discuss the grant term (Pet. App. 33a) which provides that the grant is effective notwithstanding that the land is occupied. Neither does the federal government discuss the BLM's plenary authority over public domain land, which includes the authority to grant rights-of-way. *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976).

Williams' allotment certificate been issued contemporaneously with the 1985 decision it would have been issued subject to Alaska's right-of-way material site. Alaska had nothing to appeal in 1985. Alaska's grant was secure under then-existing law. *Southern Idaho Conf. Ass'n. of 7th Day Adv. v. United States*, 418 F.2d 411, 415 (9th Cir. 1969) (a right-of-way grant issued under 23 U.S.C. § 317 remains a valid existing right to which disposition of land is subject until the grant is specifically cancelled). In fact, had Alaska attempted to appeal the decision in 1985, its appeal would have been dismissed since appeals are permitted only by parties "adversely affected" by a BLM decision. 43 C.F.R. § 4.410(a).

IV. A colorable claim of Indian title may not be based on a legal fiction applied retroactively in disregard of the facts.

The federal government argues (Opp. 19, 20) that *Foust v. Lujan*, 942 F.2d 712 (10th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992), may be distinguished because it did not address the "relation back" doctrine. The conclusion that Williams has a colorable claim of title which preempts Alaska's prior title depends on the legal fiction of "relation back". Pet. App. 9a, 17a. While *Foust* did not consider a legal fiction, its holding is nevertheless applicable because it held that the status of the land at the time the conflicting interest arises is controlling. This result is consistent with established legal precepts.

Rights that mature and that are asserted under a prior regulation cannot be affected by the retroactive application of a new regulation concerning those rights.

Greene v. United States, 376 U.S. 149, 160 (1964); *City & County of Denver v. Bergland*, 695 F.2d 465, 481 (10th Cir. 1982). The BLM's 1987 change in the interpretation of the law should not be retroactively applied to deprive Alaska of a right-of-way material site. The retroactive application of BLM's change in legal interpretation deprives Alaska of its opportunity to challenge the 1985 BLM decision and Williams' claim that her use and occupancy preceded the date of Alaska's grant. Further, retroactive application of the "relation back" fiction materially changed the grant issued to Alaska by nullifying the grant term which provides that the right-of-way is effective notwithstanding that the land was occupied. *See* note 4, *supra*.

Where the BLM and the IBLA apply a new legal interpretation retroactively, they unfairly deprive parties affected by that change of the opportunity to challenge decisions that previously had no impact on their interests in land. Having failed to provide Alaska with a " 'full and fair opportunity to litigate the claim' ", the 1985 BLM decision may not be accorded administrative finality. *People of State of California v. F.C.C.*, 905 F.2d 1217, 1245 (9th Cir. 1990). Under *Foust* the status of the land must be determined as of the date Alaska was issued its grant in 1966.

CONCLUSION

Alaska's petition for a writ of certiorari should be granted.

Respectfully submitted,

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